

No. 48457-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT HOGAN,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUE

- A. Did the trial court err when it refused to instruct the jury on the lesser included offense of Failure to Obey Officer?

II. STATEMENT OF THE CASE

On August 21, 2015, around 9:00 p.m. in Lewis County, Lewis County Sheriff's Deputy Scott Ferguson saw a red and white motorcycle enter onto State Route 603 without coming to a complete stop. RP 27-30. The weather was clear and dry, and it was fairly light out. RP 32. Deputy Ferguson first observed the motorcycle south of Fineview Road. RP 30.

Deputy Ferguson was driving his fully marked Ford Crown Victoria Lewis County Sheriff's Office official vehicle, with an external light bar, flood light, siren, and corner flashers all around. RP 30-31. The lights on the external light bar were red and blue when they were turned on. RP 31. Deputy Ferguson was also in a Lewis County Sheriff's Office issued jumpsuit style uniform. RP 31.

The motorcycle was approximately 100 yards from Deputy Ferguson when he first saw it. RP 32. There was one person on the motorcycle. RP 32. The person was wearing a black helmet. RP 32. After seeing the motorcycle enter SR 603 Deputy Ferguson activated the overhead light bar and attempted to initiate a traffic stop. RP 32.

Deputy Ferguson could see the motorcycle rapidly shifting through its gears. RP 34 The motorcycle had a very loud exhaust pipe on it. RP 34. Deputy Ferguson attempted to keep up with the motorcycle and overtake it. RP 34. Deputy Ferguson realized the motorcycle was not going to slow down, so he activated his sirens. RP 34.

Deputy Ferguson was traveling at 90 mph and was not gaining on the motorcycle. RP 34. The speed limit on SR 603 is 50 mph. RP 56. Deputy Ferguson was actually falling away slightly from the motorcycle. RP 34. The motorcycle slowed down and made a right hand turn onto Shorey Road. RP 35.

Deputy Ferguson was approximately 30 to 40 yards from the motorcycle when it made the turn onto Shorey Road. RP 36-37. Deputy Ferguson could see the driver turn his head back and look towards Deputy Ferguson before continuing on to Shorey Road. RP 36. Deputy Ferguson could again hear the motorcycle rapidly shift gears, over the sound of the siren. RP 37.

The area of Shorey Road is moderately rural, with a lot of houses, and driveways with multiple residences. RP 37. Deputy Ferguson attempted to follow the motorcycle. RP 37. Deputy Ferguson continued down Shorey Road, with his lights and siren

blaring. RP 37-38. The motorcycle and Deputy Ferguson accelerated at a rapid pace down Shorey Road. RP 38. Deputy Ferguson's top speed was approximately 100 mph, and he was losing ground on the motorcycle. RP 38. The speed limit on Shorey Road is 35 mph then it drops to 25 mph. RP 57. Deputy Ferguson eventually terminated the pursuit for his, the motorcycle's, and the public's safety. RP 40. The pursuit lasted approximately seven to 10 minutes. RP 50.

Due to where Deputy Ferguson last saw the motorcycle he was concerned the motorcycle may cut through the trail that runs from Chehalis to Adna. RP 41-44. Deputy Ferguson met up with Deputy Mauermann, who had heard Deputy Ferguson's radio traffic about the motorcycle, at the intersection of Highway 6 and Southwest Riverside. RP 45, 62. The deputies coordinated a plan to attempt to find the motorcycle. RP 47.

Deputy Mauermann was also driving a fully marked Lewis County Sheriff's vehicle, but he was driving a Ford Explorer. RP 62-63. Deputy Mauermann was in his Lewis County Sheriff's Office issued uniform. RP 63-64.

Deputy Mauermann located a person on a motorcycle with their lights off sitting on the southwest corner of the intersection of

Southwest Sylvanous and Southwest Riverside, facing towards Deputy Mauermann, who was traveling down Riverside. RP 67. The motorcycle was red and white, with a person wearing a helmet. RP 69. The motorcycle did not appear to have its lights on. RP 70.

The motorcycle gunned it and took off at a high rate of speed. RP 70. The motorcycle passed Deputy Mauermann on his left. RP 70. By the time Deputy Mauermann was able to turn around the motorcycle had already distanced itself due to the high rate of speed it was traveling. RP 70. The speed limit on Riverside is 25 mph. RP 67.

Deputy Mauermann activated his patrol vehicle's emergency lights and siren, pursuing the motorcycle. RP 71. The motorcycle turned, without using a turn signal or using hand signals. RP 73. Deputy Mauermann lost sight of the motorcycle, came to the intersection, and looked for the motorcycle. RP 73-74. Something red and reflective caught Deputy Mauermann's eye. RP 75.

Deputy Mauermann continued down to a house on Southwest Newaukum where he saw the motorcycle. RP 76. Deputy Mauermann saw the motorcycle laying down with a person with a motorcycle helmet laying on the left side of the body. RP 77. The driver of the motorcycle was Hogan. RP 78. When Deputy

Mauermann found Hogan he was sitting on his butt, with his left leg under a portion of the bike in the leg/foot area. RP 84. The motorcycle was laying on a rock type surface. RP 85-86.

Hogan told Deputy Mauermann he did not stop for the other deputy because he was "stupid." RP 79. Hogan also told Deputy Ferguson that he was stupid and he apologized for running from him and said he should have just stopped. RP 104. Hogan said he was sorry, it was stupid, should have stopped. RP 105.

The State charged Hogan with one count of Attempting to Elude a Pursuing Police Vehicle. CP 1-2. Hogan elected to have his case tried to a jury. See RP. Hogan's attorney requested a lesser included instruction for Failure to Obey Officer which the trial court denied. RP 117-22; CP 12-14. Hogan was convicted as charged. RP 177-78. Hogan was sentenced to 30 days in jail, which were allowed to be served on electronic home monitoring. CP 60-61. Hogan timely appeals his conviction. CP 69.

The State will supplement the facts as needed throughout its argument.

III. ARGUMENT

A. HOGAN WAS NOT ENTITLED TO A JURY INSTRUCTION FOR THE LESSER INCLUDED OFFENSE OF FAILURE TO OBEY OFFICER.

Hogan concedes there is sufficient evidence for a reasonable jury to find he drove in a reckless manner. Brief of Appellant 6. Hogan argues the trial court erred when it failed to give the requested lesser included instruction for Failure to Obey Officer. Brief of Appellant 4-6. The trial court did not err because the evidence does not support the inference that Hogan only committed Failure to Obey Officer to the exclusion of the charged crime of Attempting to Elude a Pursuing Police Vehicle.

1. Standard Of Review.

This Court reviews refusals to give lesser included offense instructions based upon the factual inquiry prong under an abuse of discretion standard. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

2. Hogan Was Not Entitled To Have The Trial Court Give A Lesser Included Instruction For Failure to Obey Officer.

Either party in a criminal action, the defense or the prosecution, has the right to request the jury be instructed on a lesser included offense. RCW 10.61.003; RCW 10.61.006; *State v.*

Workman, 90 Wn.2d 443, 447, 584 P.2d 382 (1978). This right is established by statute and case law but it is not absolute. *State v. Gamble*, 154 Wn.2d 457, 462-63, 114 P.3d 646 (2005). The party seeking the inclusion of an instruction on a lesser included must satisfy a factual and legal inquiry by the trial court regarding whether the inclusion of such an instruction is proper. *Id.* at 463.

The analysis regarding whether a trial court properly denied a party's request to include a jury instruction for a lesser included offense is broken into two inquiries, one legal and one factual. *Workman*, 90 Wn.2d at 447-48. "First, each element of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed." *Id.* When dealing with a crime such as Attempting to Elude a Pursuing Police Vehicle, it is clear that Failure to Obey Officer meets the legal prong of the analysis for an inferior charged offense, therefore the only necessary analysis is factual. RCW 46.61.022; RCW 46.61.024; *State v. Gallegos*, 73 Wn. App. 664, 652, 871 P.2d 621 (1994).

The factual prong of the analysis for lesser included offense requires, there is evidence that the defendant committed **only** the lesser included offense. *Gallegos*, 73 Wn. App. at 652.

Thus, the test is whether there is evidence supporting an inference that the defendant is guilty of the lesser offense *instead* of the greater one. Evidence that merely supports an inference that the defendant is guilty or not guilty of the charged offense is not enough to warrant giving a lesser included offense instruction.

Id. at 652 (internal citations omitted, emphasis original).

The reviewing court evaluates the sufficiency of the evidence in support of the lesser included in the light most favorable to the party that requested the jury instruction. *State v. Allen*, 127 Wn. App. 945, 950, 113 P.3d 523 (2005). If the trial court errs by failing to give a properly requested lesser or inferior included offense instruction, such an error is never harmless. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

The State alleged Hogan committed Attempting to Elude a Pursuing Police Vehicle. RCW 46.61.024; CP 1-2. The trial court instructed the jury on Attempting to Elude a Pursuing Police Vehicle. CP 47-48. The State was required to prove,

- (1) That on or about the 21st day of August, 2015, the defendant drove a motor vehicle;
- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren;
- (3) That the signaling police officer's vehicle was equipped with lights and siren;

(4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;

(5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner; and

(6) That the acts occurred in the State of Washington.

CP 48, *citing* WPIC 94.02. The State was required to prove that Hogan drove in a reckless manner, which is defined in a separate jury instruction. CP 49. “To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences.” CP 49, *citing* WPIC 90.05.

Hogan sought the trial court to give a jury instruction on the lesser included offense of Failure to Obey Officer. RP 117-19; CP 12-14. In order to commit Failure to Obey Officer a person must “willfully fail to stop when requested or signaled to do so by a person reasonably identifiable as a law enforcement officer or to comply with RCW 46.61.021(3)...” RCW 46.61.022.¹ The trial court

¹ RCW 46.61.021 states:

Duty to obey law enforcement officer—Authority of officer.

(1) Any person requested or signaled to stop by a law enforcement officer for a traffic infraction has a duty to stop.

(2) Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.

refused to give the jury instruction for Failure to Obey Officer. RP 122; CP 41-56.

For Hogan to be entitled to a lesser included instruction for Failure to Obey Officer there must be an inference from the evidence that only Failure to Obey Officer was committed. Gallegos, 73 Wn. App. at 652. Hogan must be able to show that the evidence inferred, in the light most favorable to him, that Hogan only willfully failed to stop when signaled by Deputy Ferguson or Deputy Mauermann, to the exclusion of eluding a pursuing police vehicle and driving in a reckless manner while doing so as alleged by the State. See RCW 46.61.022; RCW 46.61.024; Gallegos, 73 Wn. App. at 652.

The crux of Hogan's argument is that the trial court improperly determined there was only evidence of driving in a reckless manner, which he argues was properly a jury question, but it was inappropriate for the trial judge to find that Hogan's driving constituted driving in a reckless manner as a matter of law that no reasonable jury could have concluded otherwise. Brief of Appellant 6. Hogan asserts the evidence supports the inference that he only

(3) Any person requested to identify himself or herself to a law enforcement officer pursuant to an investigation of a traffic infraction has a duty to identify himself or herself and give his or her current address.

committed the lesser included offense of Failure to Obey Officer and the lesser included instruction should have been given. *Id.* Following Hogan's argument, a trial judge would never be able to apply the *Workman* test to an Attempting to Elude case because recklessness would always be a jury question and therefore, Failure to Obey Officer should always be given. The trial court did not err in the case.

The evidence in Hogan's case was he drove at speeds in excess of 100 mph in areas where the speed limit ranged from 35 to 25 mph. RP 37-38, 57. This was an area that is moderately rural, with houses and driveways. RP 37. The road is a narrow two lane country road, it has a downhill grade to it, and limited visibility in some places. RP 39. During the time that Deputy Ferguson pursued Hogan he never observed Hogan use hand signals or his turn signals when turning. RP 47. This was not driving 100 mph down the interstate at midnight with no traffic. Hogan was driving in excess of 100 mph on his motorcycle down a two lane, chip-sealed, narrow county road, which had limited visibility at points, a 35 then 25 mph speed limit, residences, and numerous driveways that entered the roadway. RP 36-39. The dangerousness of the pursuit

actually made Deputy Ferguson terminate it for not only his, and the public's safety, but also Hogan's safety. RP 40.

Hogan drove in a similar fashion when encountered by Deputy Mauermann. RP 70-77. Hogan, who was sitting in the dark, possibly with the motorcycle off, gunned his motorcycle and took off at a high rate speed. RP 70. Hogan failed to use any type of signals. RP 73. When Deputy Mauermann finally found Hogan the motorcycle was down, at a residence and Hogan was on the ground with the bike. RP 77. Further, Deputy Mauermann testified that he did not observe any taillight, or any other light from the motorcycle, when it went across all lanes of travel before entering the driveway where Deputy Mauermann discovered the motorcycle and Hogan. RP 76-77. According to Patrick Hogan, Hogan's father, if the motorcycle's engine was running the headlight was on and the taillight would be operational. RP 112-13. Therefore, the only conclusion one could make from the evidence presented is that Hogan cut the engine prior to crossing over the oncoming lane of travel and entering the driveway.

This is not a case where speed alone is the factor. The State did not request the trial court give an excessive speed inference instruction – as it is not recommended to be given by the WPIC

committee. See WPIC 94.04; CP 19-38.² The speed was the primary factor, yet, the road conditions, the area for which Hogan was driving, failure to signal, and the fact that he turned off his motorcycle while still traveling down the roadway all are evidence of Hogan's driving in a reckless manner to the exclusion of Failure to Obey Officer.

In the light most favorable to Hogan, the evidence did not support that he only committed the lesser included offense of willfully failing to stop after being signaled to do so by the deputies instead of Attempting to Elude a Pursuing Police Vehicle. See *Gallegos*, 73 Wn. App at 652. The trial court's decision to not give the lesser included instruction was not manifestly unreasonable or based on untenable grounds. Therefore, this Court should affirm the trial court's ruling and Hogan's conviction for Attempting to Elude a Pursuing Police Vehicle.

² *State v. Hanna*, 123 Wn.2d 704, 871 P.2d 135 (1994), *reversed Hanna v. Riveland*, 87 F.3d 1034 (9th Cir. 1996) permits a jury instruction to be given that allows the jury to infer reckless manner from speed when speed alone is not the sole evidence of recklessness. The WPIC committee has recommended this instruction not be given. See WPIC 94.04.

IV. CONCLUSION

Hogan was not entitled to the lesser included instruction of Failure to Obey Officer. Therefore, this Court should affirm Hogan's conviction for Attempting to Elude a Pursuing Police Vehicle.

RESPECTFULLY submitted this 12th day of July, 2016.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'JLM', written over a horizontal line.

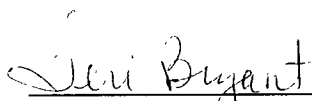
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. ROBERT HOGAN, Appellant.	No. 48457-9-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 12, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Thomas E. Weaver, Jr., attorney for appellant, at the following email addresses: tweaver@tomweaverlaw.com and admin@tomweaverlaw.com.

DATED this 12th day of July, 2016, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

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